SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 3

THE PEOPLE OF THE STATE OF NEW YORK	:	DECISION AND ORDER
-against-	:	October 6, 2011
ANTHONY PARKER, a/k/a, ALVIN WALKER,	:	
Defendant.	:	Indictment No. 3904/2003

JAMES P. SULLIVAN, J.

By papers dated February 16, 2011, defendant has petitioned this court, *pro se,* pursuant to the Drug Law Reform Act of 2009, for an order in accordance with CPL §440.46, vacating his indeterminate sentence of 7 ½ to 15 years' imprisonment on account of his November 5, 2004 conviction for criminal sale of a controlled substance in the third degree, a class B drug felony. Defendant asks to be resentenced to a determinate sentence in accordance with CPL.§ 70.70. The People have filed papers in opposition to defendant's motion. This court appointed counsel for defendant in order to research the issues in this case. Defense counsel filed papers dated May 19, 2011 in support of defendant's *pro se* motion. The People have filed an answer in opposition dated July 11, 2011. The parties have attached records, documents, and reports regarding the matter to be decided by the court. For the reasons stated below, the motion is denied.

Procedural History

On nine separate occasions, between November 6, 2002 and March 6, 2003, defendant sold quantities of cocaine and marijuana to an undercover police officer at various locations in Kings County, NY. On one of these dates, defendant sold a quantity of cocaine to an undercover officer from inside his apartment at 2100 Beekman Place in Kings County. On another date, at the corner of East 16th Street and Caton Avenue, in Kings County, defendant sold a quantity of cocaine weighing in excess of one-half of an ounce to an undercover police officer for a sum of United States currency.

On May 29, 2003, the police arrested defendant near the corner of Flatbush Avenue and Beekman Place, in Kings County, and recovered a quantity of cocaine weighing in excess of one-eighth of an ounce from a bag which the police observed defendant throw into his car. At 6:10 a.m. on the same day, the police executed a search warrant at defendant's apartment at 2100 Beekman Place, in Kings County. From inside the location, the police recovered a quantity of cocaine weighing in excess of one-eighth of an ounce and numerous empty ziplock bags.

Regarding these transactions, defendant was charged under Kings County Indictment No. 3904/2003 with one count of criminal sale of a controlled substance in the second degree (PL §220.41[1]); nine counts of criminal sale of a controlled substance in the third degree (PL §220.39

[1]); one count of criminal possession of a controlled substance in the third degree (PL §220.16 [1]); one count of criminal possession of a controlled substance in the fourth degree (PL §220.09 [1]); eleven counts of criminal possession of a controlled substance in the seventh degree and three counts of criminal possession of a controlled substance in the seventh degree (PL §220.03); and two counts of criminal sale of marihuana in the fourth degree (PL §221.40).

On November 18, 2003, defendant pleaded guilty to criminal sale of a controlled substance in the third degree, a class B felony, in satisfaction of the indictment. Under the plea agreement, defendant was promised an indeterminate prison term of 7 ½ to 15 years' imprisonment. The court allowed defendant to remain at liberty while his sentence was pending. Defendant was required to abide by certain conditions, including that he would appear on all his court dates and that he would not get arrested on any new charges. Based on these conditions the People consented to defendant's release.

Between September 1, 2003 and November 30, 2003, defendant, who was thirty years old at that time, had sexual intercourse with a thirteen-year old girl on five separate occasions. These incidents occurred inside defendant's Kings County apartment. After the girl, who also lived in the building, informed defendant that she was pregnant, defendant moved out of the building.

On January 24, 2004, defendant was arrested in New York County, and was charged with assault in the second degree and drug related charges. That case was later dismissed.

On March 3, 2004, defendant was arrested and charged with rape in the second degree. He admitted to the police that he had sexual relations with the child, but stated that she told him that she was eighteen years old. Defendant was subsequently charged under Kings County Indictment No. 1438/2004 with five counts each of rape in the second degree (PL §130.30 [1]), sexual misconduct (PL §130.20 [1]), and one count of endangering the welfare of a child (PL §260.10 [1]). On March 30, 2004, the defendant, who was not incarcerated, failed to appear in court on the present case, and a bench warrant was issued for his arrest.

On April 27, 2004, defendant was apprehended for violating the conditions of his probation for his 1997 conviction for robbery in the third degree. On the following day, defendant was sentenced to an indeterminate prison term of two to six years. On May 21, 2004, defendant entered state prison for violating probation.

Defendant was involuntarily returned to this court on the warrant on August 24, 2004. On November 5, 2004, the court denied defendant's motion of October 6, 2004 to withdraw his guilty plea. Defendant was sentenced on November 5, 2004 in the present matter, to the agreed-upon indeterminate sentence of 7 ½ to 15 years imprisonment (Sullivan, J. at plea and sentence).

On December 2, 2004, 2004, defendant pleaded guilty to rape in the second degree (PL §130.30 [1]) in satisfaction of Indictment No. 1438/2004. Defendant was sentenced on December 20, 2004 to an indeterminate term of imprisonment of 3 ½ to 7 years, to be served concurrently with

the sentence in this case. (Sullivan, J. at plea and sentence.)

By *pro se* motion papers dated December 21, 2004, defendant moved to set aside his drug felony sentence, pursuant to CPL §440.20, claiming that his sentence should be vacated because it was harsh and excessive, and because he was eligible to be resentenced under the revised sentence guidelines in accordance with the Drug Law Reform Act of 2004. The defendant, represented by counsel, moved on February 5, 2005 for a reduction of his drug sentence pursuant to CPL§440.30. In a written decision dated April 14, 2005, this court denied both motions.

Defendant, represented by counsel, appealed the instant judgment of conviction to the Appellate Division, Second Department. By decision and order October 24, 2006, the Appellate Division unanimously affirmed the sentence without opinion (*People v. Parker,* 33 A.D.3d 941 [2d Dep't 2006]). On December 5, 2006, the Court of Appeals denied defendant's application for leave to appeal. (*People v. Parker,* 7 N.Y.3d 927 [2006]) (Graffeo, J.).

In October 2007, defendant, represented by counsel, filed a brief in the Appellate Division, appealing from this court's denial of defendant's motion to be resentenced. By decision and order dated September 9, 2008, the Appellate Division unanimously affirmed denial of defendant's motions. The Court held that defendant had failed to preserve his argument that the Drug Law Reform Act of 2004 violated his constitutional rights, and that defendant's contention pertaining to the Drug Law Reform Act of 2005 was not properly before the Appellate Division (*People v. Parker,* 54 A.D.3d 779 [2d Dep't 2008]). Defendant's application for leave to appeal was dismissed on October 23, 2008. (*People v. Parker,* 11 N.Y.3d 834 [2008]) (Smith, J.).

By papers dated October 16, 2009, defendant, represented by counsel, moved for resentencing on his drug felony conviction, pursuant to CPL §440.46. The People argued in opposition that defendant was not eligible because he was serving a sentence for an exclusion offense. Defense counsel withdrew the motion on November 24, 2009.

With respect to defendant's criminal history, in addition to the instant conviction, defendant has two felony convictions, as well as a misdemeanor conviction. On January 13, 1997, defendant was arrested for committing an armed robbery in Kings County. During the pendency of the case, numerous bench warrants were issued by the court due to defendant failure to return for his scheduled appearances. On May 1, 1998, defendant pleaded guilty to robbery in the third degree pursuant to Indictment No. 0467/1997, and on August 14, 2000 was sentenced to 6 months in jail and 5 years' probation. On November, 30, 1998, while this sentence was still pending, defendant was arrested in Niagra County for criminal impersonation. On January 12, 1999, defendant pleaded guilty to attempted criminal impersonation in the second degree and was sentenced to time served.

As previously stated, while sentence on the case at bar was pending, defendant was arrested and charged with rape in the second degree, sexual misconduct, and endangering the welfare of a child with respect to incidents involving having sex with a thirteen year old girl. Defendant was subsequently convicted of rape in the second degree (PL §130.30 [1]).

With respect to his institutional record, defendant has committed nine disciplinary violations, all of which were Tier II violations. His most recent infraction occurred on May 12, 2011, and involved fighting and not reporting an injury he had sustained as a result of the confrontation. As a result of this incident, defendant received 30 days of keeplock time, of which 10 days were suspended. Defendant has completed the Residential Substance Abuse Treatment Program and Aggression Replacement Training Program. Defendant further completed a Basic Course in Nonviolent Conflict Resolution, offered by the Alternatives to Violence Project in January of 2010. Defendant is currently enrolled in a sex offender counseling program although he had been removed due to disciplinary reasons during the period from November 8, 2010 to May 22, 2011. However, the last report, dated July 11, 2011, indicates that defendant "appears to have improved his institutional behaviors." Although defendant was previously enrolled in a pre-GED program, he is currently not enrolled in one. Defendant has participated in Department of Corrections vocational training programs resulting in his obtaining job titles as a concrete block mason and a bricklayer helper. Defendant is currently incarcerated. He was denied parole in March of 2011. His next parole hearing is in November of 2012. His conditional release date is February 20, 2014. Defendant's maximum expiration date is February 20, 2019.

Conclusions of Law

Criminal Procedure Law §440.46 is the codification of the Drug Law Reform Act of 2009, which allows defendants convicted of a class B, C, or D drug felony to apply to the court for re-sentence pursuant to Penal Law §§60.04 and 70.70. The statute explicitly limits the applicability of the sentencing provisions to those defendants who are presently in the custody of the Department of Corrections ("DOCS"). *See,* CPL §440.46 (1). This statute is similar in nature to the 2004 and 2005 Drug Reform Act which permitted defendants convicted of a class A-I or A-II drug felony offense to apply to the sentencing court to be resentenced pursuant PL §70.71. (L 2004, ch. 738, §23, [DLRA1], L 2005, ch 643, §1, [DLRA2]). The court notes that CPL §440.46(3) specifically states that "the provisions of section 23 of chapter seven hundred thirty eight of the laws of 2004 (DLRA1) shall govern the proceedings on and determination of a motion brought pursuant to this section."

Pursuant to CPL. §440.46 (3), a movant shall be resentenced pursuant to Penal Law §§60.04 and 70.70 unless "substantial justice dictates" that resentencing be denied, referencing §23 of chapter 738 of the laws of 2004 (the "Drug law Reform Act of 2004"). In determining whether to grant or deny an eligible defendant resentencing, CPL §440.46 (3) directs that the court may consider defendant's participation in "treatment or other programming while incarcerated and such person's disciplinary history."

With regard to the instant matter, the People oppose the defendant's motion, contending, first, that the defendant is not eligible for resentencing as he is was convicted of "an exclusion offense" within the last ten years, and is presently serving time for that offense. The People allege that defendant's conviction for rape in the second degree (PL §130.30) is not only a violent felony offense (PL §70.02 [1] [c]), it is also a crime for which merit time allowance is not available under Correction Law (*see,* Corr. Law §803 (a)(d)(1). The People further argue that if the defendant were

eligible, "substantial justice" dictates that he not be resentenced. Defense counsel counter-argues that defendant is not serving a sentence on "an exclusion offense" as he is not serving a sentence on a violent or merit ineligible offense for which he was "previously convicted within the proceeding ten years"(CPL §440.46 [5] [a]). Thus, defendant argues that the language of the statute requires that an exclusion offense must fall within ten years of the motion's filing date, and that it must precede defendant's conviction on the instant case. The defendant further argues that "substantial justice" dictates that the defendant be resentenced.

The court has carefully reviewed the moving papers, related documents, and relevant court decisions pertaining to this matter. Initially, the court notes that although the charge of rape in the second degree (PL §130.30) is now classified as a Class D Violent Offense pursuant to PL §70.02 [1] [c], at the time of defendant's conviction for rape in the second degree, this charge was not classified as a violent offense (*see,* L. 2007, ch 7, §32, [inserting "rape in the second degree as defined in section 130.30"]). Clearly, in the present matter, defendant's conviction for rape in the second degree cannot be considered an exclusion offense based on the mere allegation that it was "a violent felony offense as defined in section 70.02 of the penal law " (CPL§440.46 ([5] [a] [I]). Nonetheless, defendant conviction is an offense for which "merit time allowance is not available" pursuant to Corr. Law §803 (a)(d)(1), and may constitute an exclusion offense if all other requirements of the statute are satisfied.

Next, the court must address defense counsel's further argument that defendant's conviction for rape in the second degree cannot be considered to be an exclusion offense as it did not precede defendant's conviction on the present matter. Initially, the courts have held that the look-back period is measured from defendant's motion for resentencing, as opposed to the commission of the drug felony offense. (*People v. Lashley*, 83 A.D.3d 868 [2d Dept. 2011]; *People v. Carter,* 86 A.D3d 653 [3rd Dept. 2011]). In the present case, this court concludes that the 2004 conviction was obtained within the ten year look-back period from the filing of defendant' motion for resentencing.

Further, after considering the terms "previous felony" and "present felony " contained in the statute, the Appellate Division, Third Department, in a case very similar to the present matter, determined that it could not "find that defendant was convicted of an exclusion offense during the statutory look-back period." The Court held that because the possible exclusion offense was committed after the drug conviction, it could not find that defendant was *per se* ineligible for resentencing (*People v. Devivo,* 87 A.D. 3d 794 [3d Dept. 2011]).

At this time, there is no Appellate Division, Second Department, or Court of Appeals decision on this issue. This court determines that the facts in *Devivo* are sufficiently similar to the present matter that it should be controlling on the defendant's case. (*see, Mountain View Coach Lines v. Storms,* 102 A.D.2d 663 (2d Dep't 1984). Thus, in light of *Devivo,* this court finds that the defendant is eligible for resentencing pursuant to CPL §440.46.

Even though this court has held that defendant is not *per se* ineligible for resentencing pursuant to CPL §440.46, this court denies the application in the interests of "substantial justice." This court is aware that "consistent with the statutory language, case law indicates a presumption in favor of granting a motion for resentencing. . ." (*People v. Beasley,* 47 A.D.3d 639, 649 [2d Dep't 2008]). However, the court must take into account the seriousness of the present charges, defendant's history of absconding, his failure to live a law-abiding life upon his release, his re-arrest while on probation, and his subsequent violation of probation, as well as his institutional record.

Initially, a review of the facts of the instant case indicate that defendant was charged with selling drugs in various locations on nine separate occasions, one of which was from his home. After executing a search warrant at his residence, the police recovered a quantity of cocaine weighing in excess of one-eighth of an ounce and numerous empty ziplock bags similar to those used by defendant. These facts cause the court to question whether defendant is the type of offender for whom the legislature sought to provide relief.

Not only did defendant fail to appear during various court dates during the pendency of his robbery charge in1997, but after entering a plea of guilty to the indictment, defendant was rearrested in Niagra County upon his release.

Further, defendant failed to abide by the terms of his probation, by committing the instant offense while still on probation for the robbery charge. In determining a motion under CPL § 440.46 the court can take into consideration not only the act of defendant absconding from the proceedings, but the consequences of his acts after his absconding. More disturbing to this court is that after being released on the present case, defendant committed the acts resulting in him being charged with rape in the second degree for repeatedly have sexual intercourse with a thirteen year old girl. In addition, defendant subsequently failed to appear in court on the present matter, and a bench warrant was issued for his arrest.

Although the fact of defendant's conviction for rape in the second degree does not make him *per se* ineligible for resentencing, this court determines that defendant's conviction for a rape in the second degree occurring after he committed the present crime is a factor to be considered in a motion pursuant to CPL. §440.46 (*see, People v. Devivo, supra*). Thus, this court determines that this fact weighs heavily against granting his application for resentencing.

The court notes that defendant has committed nine Tier II disciplinary violations during his period of incarceration. Although many of the violations do not appear to be of a serious nature, the court is disturbed that his most severe violation for fighting occurred less than four months ago. While the court does recognize that defendant has completed programs such as the Residential Substance Abuse Treatment program, the Aggression Replacement Training Program, as well as a Basic Course in Nonviolent Conflict Resolution, the court is concerned by the fact that defendant received a Tier II violation for fighting after completing these programs. Defendant is presently involved in a sex offender counseling and treatment program. However, the court notes that he was previously removed from the program for several months due to disciplinary reasons. The court finds

that serious of the underlying crime, his criminal history, defendant's failure to comply with the terms of his probation, his re-arrest while on probation, his repeated absconding, his arrest for rape in the second degree upon his release on the present case cumulatively outweigh defendant's efforts at rehabilitation and other mitigating factors he cited.

In light of the foregoing, upon due consideration of all relevant material, pursuant to CPL §440.46 (3), this court concludes that substantial justice dictates that the motion be denied. Therefore, defendant's motion for resentencing is denied. Defendant's original sentence remains in effect.

This constitutes the decision and order of the court.

Dated: October 6, 2011

James P. Sullivan, J.S.C.
HON. JAMES P. SULLIVAN
J.S.C.